Sea-Jet Trucking Corporation, A.P.A. Warehouses, Inc., Affiliated Terminals, Incorporated, Sea-Jet Industries Incorporated, and Sea-Jet Trucking & A.P.A. Warehouse, Inc., a Single Employer *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO. Case 29–CA–18500

January 29, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On May 7, 1997, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Union filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union concerning the effects on employees of the Respondent's relocation of its facility from Brooklyn, New York, to Bloomfield, New Jersey.[3] We further agree that a *Transmarine*[4] limited backpay remedy is warranted to remedy the Respondent's effects bargaining violation. We find merit, however, in the Respondent's exception to the judge's modification of the standard *Transmarine* remedy to include in the backpay calculations the employees' increased transportation costs or moving expenses. Matters such as moving expenses or increased transportation costs occasioned by the relocation of the Respondent's facility are issues over which the parties may bargain pursuant to the *Transmarine* remedy. In our view, however, they are not germane to backpay computations.

Additionally, we have modified the judge's remedy to conform with *Transmarine* remedy language changes that the Board adopted subsequent to issuance of his decision in this case.[5] We have also modified his remedy to delete general bargaining order language that does not apply to the type of 8(a)(5) violations found here. Accordingly, an amended remedy is set forth below.

AMENDED REMEDY

1. Delete the first two paragraphs of the judge's recommended remedy and insert the following.

"Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act."

2. Insert the following at the end of the fourth paragraph of the judge's recommended remedy.

"Accordingly, we shall require the Respondent to pay to the unit employees involved in the relocation in any way their normal wages when in the Respondent's employ from 5 days after the date of this decision until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the relocation of the Respondent's facility from Brooklyn, New York to Bloomfield, New Jersey; (2) the date a bona fide impasse in bargaining occurs; (3) the failure of the Union to request bargaining within 5 business days after receipt of this Decision, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any employee exceed the amount that he or she would have earned as wages from the date of the relocation of the Respondent's facility to the time he or she secured equivalent employment; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ, with interest."

3. Delete the twelfth paragraph of the judge's recommended remedy.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sea-Jet Trucking Corporation, A.P.A. Warehouse, Inc., Affiliated Terminals, Incorporated, Sea-Jet Industries, Incorporated, and Sea-Jet Trucking & A.P.A. Warehouses, Inc., a single employer, Bloomfield, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified.

1. Substitute the following for paragraph 2(c).

"(c) Furnish to the Union in a timely fashion the information requested by the Union in its May 10, May 13, and August 10, 1994 letters."

[1] We deny the Union's request for an award of attorney's fees, as we find that the Respondent's defenses were not frivolous. See *United States Service Industries*, 324 NLRB 834, 838 fn. 20 (1997); *Frontier Hotel & Casino*, 318 NLRB 857 (1995), enf. denied in part 118 F.3d 795 (D.C. Cir. 1997).

[2] We have modified the judge's recommended Order to require the Respondent to provide the Union with the information that it requested without the necessity of making a new request. See *I & F Corp*., 322 NLRB 1037 fn. 1 (1997).

[3] As the Respondent did not give the Union any advance notice of its final decision to relocate, we find it unnecessary to pass on the judge's statements, in the second paragraph of sec. III,B of his decision, concerning how far in advance an employer must notify a union when selling a business or relocating a facility. See *Compact Video Services*, 319 NLRB 131 fn. 1 (1995).

[4] *Transmarine Navigation Corp*., 170 NLRB 389 (1968).

[5] See *Melody Toyota*, 325 NLRB 846 (1998).

Rosalind Rowen, Esq., for the General Counsel.
Steven B. Horowitz, Esq. (Horowitz & Associates, P.C.), for the Respondent.
Thomas W. Meiklejohn, Esq. (Livingston, Adler, Pulda & Meiklejohn, P.C.), for the Union.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. Upon the basis of a charge filed on August 31, 1994 by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (UAW or the Union), against Sea-Jet Trucking Corporation, A.P.A. Warehouses, Inc., Affiliated Terminals, Incorporated, Sea-Jet Industries Incorporated, and Sea-Jet Trucking & A.P.A. Warehouses, Inc., a Single Employer (the Respondent, or the Employer), a complaint and notice of hearing was issued on June 30, 1995, alleging that the Respondent violated Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act (the Act).[1] By answer timely filed the Respondent denied the material allegations in the complaint.

A hearing was held before me in Brooklyn, New York, on July 10, 11 and 24, 1996. Subsequent to the close of the hearing, the General Counsel, the Union, and the Respondent filed briefs.

On the entire record and the briefs of the parties, and on my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondents, all Delaware corporations, have their principal offices and place of business located at 8 Franklin Street, in the Township of Bloomfield, State of New Jersey (the New Jersey facility), formerly located at 140–143d Street, in the Borough of Brooklyn, City and State of New York (the Brooklyn facility). The Respondent admits that at all times material, the Respondents have been affiliated businesses with common officers, ownership, directors, and operators and have formulated and administered a common labor policy affecting employees of its operations. I therefore find that the Respondents constitute a single integrated business enterprise and a single employer within the meaning of the Act. Moreover, the Respondent admits and the evidence shows that Respondents each are and have been at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2]

II. THE LABOR ORGANIZATION INVOLVED

It is undisputed that the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

Background

Pursuant to an election conducted by the Board on March 28, 1988, the Union was certified on December 19, 1989 as the bargaining representative of the Respondents' employees in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, as follows:

> All full time and regular part-time warehouse employees employed by Sea-Jet Trucking Corporation, A.P.A. Warehouse, Inc., affiliated Terminals, Incorporated, Sea-Jet Industries, Incorporated, and Sea-Jet Trucking & A.P.A. Warehouse, Inc., at its 140-43rd Street, Brooklyn, New York location, excluding all office clerical employees, trailer drivers, truck drivers, drivers' helpers, building maintenance employees. truck maintenance, professional employees and supervisors as defined in the Act.

See, *Sea-Jet Trucking Corp*., 304 NLRB 67, 68 (1991).

On January 17, 1990, the Union made a request to meet and bargain with the Respondent, and requested information relevant and necessary to its role as bargaining representative, those requests were refused. *Sea-Jet Trucking Corp*., 304 NLRB at 68. A charge filed by the Union ultimately resulted in a United States Court of Appeals (2d Cir. 1992) judgment on July 15, 1992, enforcing the Board's Order in 304 NLRB 67 (1991); that Board Order and the Court's Judgment required the Respondent to meet and bargain with the Union and provide the Union with the information requested in 1990. Although bargaining commenced in 1992, the Respondent and the Union have never entered into a collective-bargaining agreement.

Other litigated unfair labor practice charges involved the Respondent's refusal to reinstate an unfair labor practice striker, 291 NLRB 627 (1988), enfd. 141 LRRM 2488 (D.C. Cir. 1990), 307 NLRB 134 (1992); the improper reinstatement of twelve unfair labor practice strikers who were assigned more onerous work and/or improperly transferred to less desirable positions, 302 NLRB 110 (1991); three unlawful discharges, 302 NLRB 110 (1991); and the Respondent's violation of Section 8(a)(1) and (3) as found in *Orbit Corp*., 294 NLRB 695 (1989).

A. The Evidence

By letter dated April 6, 1994, Sanford E. Pollack, Esq., An attorney for the Respondent, notified the Union that "The economic conditions in the location in which our client presently operates forces as to consider the possibility of relocating all or

[1] On January 27, 1995, the Regional Director for Region 29 in Case 29–CA–18500 dismissed that portion of the UAW charge which alleged that the Respondent unlawfully failed or refused to bargain with the Union regarding its decision to relocate its operations, and transfer equipment and employees, from Brooklyn, New York to Bloomfield, New Jersey, stating: "Under current Board law, if an employer can establish that its decision to relocate its operations did not turn on labor costs, it is relieved of the obligation to bargain over that decision. *Dubuque Packing Co*., 303 NLRB 386 (1991)." However, the Region 29 dismissal letter does not state that the UAW's request to bargain over the decision to move was unlawful, or that the UAW had bargained to impasse over this nonmandatory bargaining subject, nor was a charge filed to that effect by the Respondent. An appeal by the Union of that dismissal was denied. The complaint in this case alleges that the Respondent failed and refused to bargain in good faith over the affects of such a relocation in violation of Sec. 8(a)(1) and (5) and Sec. 2(6) and (7) of the Act.

[2] The Respondents individually have been engaged at all times material and respectively in interstate and intrastate transportation of freight and commodities, in transportation, warehousing, and storage of freight and commodities in interstate commerce, providing the service of consolidation and distribution of freight and commodities; and as a purchasing agent providing financial services, including the purchase of materials, supplies and equipment for Respondent A.P.A. and Respondent Sea-Jet Trucking; etc.

part of our present facilities", and we would be "happy to discuss the problem with you and receive your input In that regard." A meeting between the parties was held on May 10, 1994 at the Union's subregional office in New York City. In attendance for the Respondents were Harold Pretter, the Respondent's, controller, and Gary Cooke, Esq., an attorney representing the Respondent. Representing the Union were Robert Madore, assistant regional director for Region 9A of the UAW, Beverly Gans, subregional director for Region 9A of the UAW, and Charlie Gibbons, a business agent for Local 365 UAW.

At the May 10, 1994 meeting the Respondent advised the Union that they had entered into a binder (a tentative agreement to either lease or buy a facility) for an unspecified location in Bloomfield, New Jersey." The Respondent cited the costs of doing business in New York, including tolls, gas, and taxes as their rationale for desiring to relocate and not labor cost related, and promised that if they made a firm commitment to relocate, "we will let you know." Madore asked Cooke whether the Respondents had identified a "time line" as to when the move might occur, but the Respondents stated that they had not. Madore testified that he also requested information needed by the Union to bargain over both the possible decision to move and its effects, but did not receive clear or specific answers to most of his questions. Neither of the Respondent's representatives specifically questioned the relevance of the information the Union was requesting. Madore testified that he stated explicitly at the meeting that, if the Respondent were unwilling to engage in decision bargaining, the Union nonetheless wanted to bargain over the effects if a decision to move were made. At the end of the meeting Madore indicated that on May 13, 1994 he would follow up with a written information request, and that once he received the information, he would contact the Respondent to arrange for additional meetings.

During the negotiation session, the parties discussed the benefits that the employees of the Respondent received, including vacation, holidays, annuity, jury duty, bereavement, employees out on absence, employees out on worker's compensation, and insurance claims. Harold Pretter indicated that all benefits would remain the same in New Jersey in accordance with what had been provided in the past except that wage rates would increase to New Jersey's higher minimum wage rates. The Respondent asserted that the benefits that the employees of the Respondent received during all relevant times would be the same as were previously provided to Beverly Ganz through the ongoing collective-bargaining negotiations with the Union, and Pretter also advised the Union that all employee's would be offered continued employment in New Jersey. Pretter testified that the negotiations concluded with Madore indicating that the Union insisted on bargaining over *both* the decision *and* the effects together, and would not schedule any additional meetings *until* the company provided extensive documentation pertaining to both the decision and the effects of the relocation.

Pretter testified that on May 11, 1994, the Respondent forwarded some of the information requested the previous day to the attorney for the Union, including the participation agreement with Local 348, which referenced the annuity plan that the Respondent offered, along with an offer for the Union to review the books and records of the Respondent based on the extent of the request for information that was made of the Respondent at the negotiation session. It was not until after the charges had been filed on this matter on August 31, 1994 that a representative of the Union finally did appear at the Respondent's place of business to inspect the books and records as previously offered by the Respondent on May 11, 1994.

By letter dated May 13, 1994, Madore wrote to Cooke requesting the information relevant to both the possible decision to relocate and its effects. The letter stated that the Union would be "willing to begin negotiations immediately upon the Company fulfilling the following information requested . . .," and concludes:

> We need this information to bargain over the decision, not just the effects. We cannot bargain over this decision without possession of this information. We are informing you that we believe you must give us sufficient time and information to bargain over any decision as that we may make effective proposals . . . Upon receipt of the above-requested information, we will exchange dates with which to begin bargaining over the Decision.

Pretter stated that the attorney for the Respondent also advised the Union on May 13, 1994 that the move was economically motivated and, not related to labor costs. Pretter related that in fact the Respondent incurred greater labor costs in New Jersey, based on its higher minimum wage, a consideration recognized by the Regional Director, among other things in the partial dismissal of the Union's charge dealing with the Respondent's decision to relocate to New Jersey (R. Exh. 2, p. 2, par. 1). Also, according to Pretter, the Union was notified that the move would take 6 months to complete, beginning at the end of the summer/early fall 1994.

On May 23, 1994, Cooke wrote a letter to Madore, stating, "I have forwarded a copy of your request to the Company in order for them to compile the documents which you requested. We will forward the information as soon as it becomes available." This letter does not state that any of the information requested by Madore had been previously provided to the UAW, or that any of the information did not have to be provided because it was not relevant to effects bargaining.

In late July or early August 1994, Carl Redis, a UAW international representative, told Madore about rumors among the Respondents' employees about an impending plant relocation. On August 10, 1994, Madore wrote a letter to Cooke stating that it was his understanding that the Respondent was moving equipment and transferring employees to either a Brooklyn location or a New Jersey location. The August 10 letter also requested further information about the move and its effects, and reminded Cooke that he had not forwarded any information to Madore pursuant to the requests made on May 10 and May 13, 1994. There was no response to Madore's August 10, 1994 letter. Although Pretter testified at the hearing that the Respondent had not commenced its relocation operation as of August 31, 1994, the UAW filed its charge in the instant case, Case 29–CA–18500.

On September 13, 1994, the Respondent entered into a lease with Newels Realty, to occupy a building on property located in Bloomfield and Belleville, New Jersey. The lease states that the Respondent Sea-Jet "is the occupant of a portion of a building situated on the Property," and that "Sea-Jet desires to remain in possession of the Premises." A copy of the lease was attached to a letter to Region 29 dated November 10, 1994, which was also copied to Madore. The lease states that " the Property [is] more particularly bounded and described in Exhibit A attached hereto (Property)", but exhibit A was not provided to Region 29, or to the UAW. According to Pretter, it

was not until October, 1994 (contrary to the language in the lease) that the Respondent commenced its relocation from Brooklyn, New York to Bloomfield, New Jersey. In early October, 1994, employees were given forms to sign to indicate whether or not they wished to relocate to New Jersey, but the UAW was not told about this. The move was completed in January 1995.

The Respondent never notified the UAW that it had decided to proceed with the move nor that it had decided not to bargain with UAW over the decision to move. Moreover, the Respondent failed to notify the Union that it had concluded that it had no obligation to furnish the information requested by the Union in May 1994, even regarding the effects of the relocation. Subsequent to the May 10, 1994 meeting, the Union made no further request to meet and bargain with the Respondent because, according to Madore, without the necessary information, the Union was unable to develop severance proposals for employees who opted not to relocate, or proposals regarding transportation costs and other matters pertaining to employees who did choose to relocate.

The move of the Respondent started in October of 1994. Prior to the move, the Respondent circulated to every unit member an offer of continued employment, asking them to check off whether or not they would make the relocation. According to the Respondent this notice was circulated based on the assurances at the May 10, 1994 negotiations session that the Respondent would offer continued employment to all employees in New Jersey.

Subsequent to the filing of the charges in this case, the Respondent did provide additional information to the Region, with copies to the Union regarding whether the decision to relocate was a mandatory subject of bargaining. The Respondent asserts that at no time after the receipt of the documentation presented did the Union ever request to bargain over the effects of the move only. Not even after the dismissal of the "decisional" aspect of the charge by the Regional Director for Region 29 on January 25, 1996, and the completion of the relocation completed in January 1995 and to date, had the Union requested to negotiate limited only to the issue of effects of the move. The Respondent also maintains that the Union was already in possession at the time of the trial of all necessary documentation and information so as to formulate substantive proposals regarding effects bargaining and has still failed to request to negotiate limited only to the issue of effects of its move.

Finally, at the May 10, 1994 negotiations, the Respondent adamantly rejected the paying of severance to any employee who chose not to relocate. Moreover, the Company also rejected the proposals for transportation costs in that most employees would receive an increase in wages caused by the move to New Jersey.

The Union on May 10 and 13, 1994 by letter and orally requested the Respondent to furnish the following information as set forth in the complaint and any evidence in the record pertaining thereto, paragraph 17.

1. Location and mailing address of the New Jersey facility.

The Respondent never provided this information to the UAW on November 10, 1994, as discussed above, the Respondent provided Region 29 with a copy of their lease dated September 13, 1994, "for a portion of the property located in the Townships of Bloomfield and Belleville, New Jersey . . . described in Exhibit A annexed hereto," but Exhibit A was not provided to the Region. A copy of this incomplete lease was also sent to Madore.

2. Information pertaining to the Respondents' Annuity Plan covering employees in Brooklyn Unit.

No pertinent information was provided. At the meeting on May 10, 1994, when Madore asked whether the Respondent had a pension plan, Pretter told him that they had an annuity plan with Local 342, but that Pretter did not have the details. Pretter did not tell the Union which job classifications were covered by the annuity plan, or inform the UAW that the annuity plan did not cover the warehouse unit. At the hearing on July 11, 1996, the Respondent's attorney stated with reference to the Respondents' Exhibit 7," This is an annuity plan. The exhibit actually contained no annuity Moreover, on July 24, 1996, during Pretter's testimony at the hearing, Madore learned that bargaining unit employees were not covered by the annuity plan.

3. Holidays to be paid to employees prior to any layoff.

At the May 10, 1994 meeting, Pretter only said that the Respondent currently had nine paid holidays.

4. Names of any Brooklyn Unit employees with unpaid Bereavements leave claims, and number of days owed.

At the May 10, 1994 meeting, Pretter told Madore that the past practice in Brooklyn would continue in the event that the Respondent moved to New Jersey, but was unsure what the Respondents' actual past practice was.

5. Names of any Brooklyn Unit employees currently on jury duty and any money owed to them.

At the May 10, 1994, meeting Pretter told Madore, "whatever we've done in the past, we'll continue to do."

6. The present vacation schedule, and names, seniority dates, and departments of employees eligible for vacations.

At the May 10, 1994, meeting Pretter stated that the current vacation schedule was "whatever it was in the past" but that he did not know what it was. No information identifying employees currently eligible for vacation time was provided.

7-8. Names and clock numbers and type of leave, for all Brooklyn Unit employees presently on leaves of absence; list of Brooklyn Unit employees on layoff and benefits owed or received.

The Counsel for the General Counsel asserts that the Respondent provided none of this information.

9. List of bargaining unit employees presently on Workers Compensation, with the amounts of Benefits owed or being received by these employees.

Beverly Gans' bargaining notes indicate that at the May 10, 1994, meeting Pretter told Madore that there were no employees on Workers Compensation that he knew of.

10. List of bargaining unit employees with unpaid hospital insurance claims.

No such list was ever provided, and the Respondent never gave the Union a clear answer as to whether the warehouse employees had health insurance coverage in 1994. Rather the Respondent provided contradictory documentation as to whether or not bargaining unit employees had health coverage in the past. On August 28, 1992, the Respondent informed the UAW that there was presently no health insurance plan covering bargaining

unit employees. On May 11, 1994, however, Cooke sent Eugene Eisner, Esq., an attorney, representing the UAW who was not at the May 10, 1994 meeting, a copy of a "participation agreement" dated August 10, 1990, which purports to show that Bargaining unit employees did have health insurance coverage as of 1990.

11-15. Copy of the Respondents' insurance plan, benefits schedule procedure and premiums paid; list of employees with unpaid life insurance claims and amounts owed; list of all bargaining unit employees with the average hours they worked since 1990, and current rates of pay; list of all bargaining unit employees with estimated list of earnings for the year 1990 due to the reduction of employees; list of part-time employees, their jobs and Hourly wages, respectively.

The Counsel for the General Counsel asserts that some of the requested information was provided to the Union.

16-20. A copy of the job classifications; side agreements with bargaining unit employees or any employee committee since January 1990; overtime records of bargaining unit employees since January 1990; names and wage rates of employees who exercised bumping rights since January 1990; list of names of bargaining unit employees temporarily transferred, the length of time and the rates of pay paid since that time; respectively.

The Counsel for the General Counsel maintains that none of the above information was provided to the Union by the Respondent.

Moreover, paragraph 18 of the complaint asserts that on or about August 10, 1994, Madore requested that the Respondents furnish the Union with the following additional information.

1. Names of members of the Brooklyn Unit who were transferred to the new location, their salaries, benefits, any incentives, and any compensation for transportation costs.

2. Type of work being performed at the new location, number of employees at the Brooklyn facility and the new location and their hours and benefits.

Counsel for the General Counsel alleges that the above information was not provided except that the Respondents told the UAW at the May 10, 1994, meeting, that they would not compensate employees for transportation costs to New Jersey or make severance payments to any employee who chose not to relocate. Additionally, on February 23, 1995, nearly six months later and well after the move was completed, the Respondents sent Region 29 a copy of Respondents' January, 1995, payroll records, with a copy to Madore.

The Respondent asserts that at all material times, the Union was already in possession of much of the necessary documentation and information so as to formulate substantive proposals regarding effects bargaining.

Credibility

The resolution of the issues in this case requires some determination of the credibility of the parties respective witnesses. After carefully considering the record evidence, I have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities and reasonable inferences which may be drawn from the record as a whole, *Gold Standard Enterprises, Inc.*, 234 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977), *Northridge Knitting Mills*, 223 NLRB 230 (1976).

Two witnesses testified herein, Robert Madore for the General Counsel and Harold Pretter for the Respondent. Both the General Counsel and the Union assert that Pretter was not a reliable witness because of his inconsistent, evasive, and shifting testimony and should be discredited. The Respondent maintains, in effect, the same about Madore. Interestingly enough, as the record shows, both have some merit to their allegations. Therefore as the occasion arises, I will discuss the issue of credibility as it effects the issue or circumstances presented in the light of my additional evidence such as documentary evidence or the failure to call witnesses or present documents to support testimony given herein,

B. Analysis and Conclusions

The complaint alleges that the Respondent has failed and refused to bargain collectively with the Union with respect to the effects of the relocation of its facilities from Brooklyn, New York to Bloomfield, New Jersey in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Under Section 8(a)(5) and 8(d) of the Act, an Employer who relocates is required to bargain in good faith with the collective-bargaining representative of its employees regarding the effects of the relocation on those employees, even where decisional bargaining is not required as a mandatory subject of bargaining. *Transmarine Navigation Corp.*, 170 NLRB 389 (1968); *Otis Elevator Co*., 283 NLRB 223 (1987); *Morco Industries, Inc.*, 279 NLRB 762 (1986). Also, see *Richmond Convalescent Hospital,* 313 NLRB 1247 (1994). Moreover, in *Metropolitan Teletronics Corp.,* 279 NLRB 957 (1986) the Board stated, "The Company was obligated to bargain 'in a meaningful manner and at a meaningful time' with the [Union] over the effects on employees of the decision to close and relocate. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 681-682 (1981)." An element of "meaningful" bargaining is "timely notice to the Union" of the decision. *Penntech Papers, Inc. v. NLRB,* 706 F.2d 18, 26 (1st Cir. 1983); *Metropolitan Teletronics*, supra. At a minimum, this requires that a union be notified of the relocation before it takes place, rather then being confronted with a fait accompli. *Transmarine*, supra. In the context of the sale of a business, the minimum requirement is that a union be notified of the sale when the Employer executes a binding agreement to sell the business. *Compact Video Services*, 319 NLRB 131 (1995). This would imply that in the context of a relocation, a union must be notified of an impending move at least by the time the Employer enters into a lease, or a contract to buy the new facility. Moreover, notice to the union must be definite and unequivocal. *Metropolitan Teletronics*, supra at footnote 5.

For example, in the sale context, the statement that "there may possibly be a prospective buyer for the facility" does not constitute notice, where there is no notice as to the timing of the sale or the identity of the new owner; promises to provide notice which are later breached may only serve to mislead a union. *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990).

In the instant case, despite the Respondent's contention, the Union was not given notice of the move. On April 6, 1994, the Respondent merely notified the Union that it was "consider[ing] the possibility of relocating all or part of its present facilities." At the May 10, 1994 meeting, the Respondent advised the Union that it had entered into a tentative agreement to lease or buy a facility in Bloomfield, New Jersey, "no definite contract yet to that property," that there was a confusing "time

line" as to when the possible move might take place since Pretter testified that at the meeting he told Madore that "it would take about six months to complete starting the end of summer, early fall" 1994, and that the Respondent would "let [the Union] know" if it made a firm commitment to relocate. The Respondent never let the Union know as promised. Moreover, the Respondent stated at the May 10, 1994 meeting that the "pick and pack" department would stay in Brooklyn. This was untrue. Additionally, based on this assertion and the Union's expectation that in the event of a decision to relocate, the Union would receive notice, the Union could not possibly have guessed that the Respondent's 15-year lease for the Brooklyn facility expired on December 31, 1994, or that the move to New Jersey would be timed to coincide with the expiration of the Brooklyn lease. At the May 10 meeting, when Madore asked if there was a time line for the move, it would have made sense for the Respondent to advise the Union that the December 31, 1994, expiration date on the Brooklyn lease was their time line if this was true. Also, the lease for the New Jersey facility is dated September 13, 1994. As soon as the Respondent made a definite decision to enter into the September lease, the Union should have been notified. The failure to do so constitutes failure and refusal to bargain in good faith.

As set forth hereinbefore, it is well established that, even if a decision to relocate bargaining unit work is not a mandatory subject of bargaining, an employer is obliged to bargain over the effects of that move on bargaining unit employees. *Otis Elevator Co.*, supra, *Morco Industries,* supra. The undisputed evidence establishes that the Respondent failed and refused to bargain over the effects of the decision to relocate. First, admittedly the Respondent relocated bargaining unit work from Brooklyn to New Jersey. Second, the evidence establishes that Madore requested decision and effects bargaining at the May 10, 1994 meeting and in his letters to the Respondent of May 13 and August 10, 1994.

Moreover, during the May 10, 1994 meeting Cooke was ambiguous in his responses to Madore's request for decision bargaining. He clearly said nothing to advise the Union that the Respondents' decision not to bargain over the decision to relocate was final, so that the parties would have to proceed to effects bargaining. The Respondents' actions thereafter evidences that the Respondent decided to completely ignore its bargaining obligations to deal with the Union regarding the move. Cooke responded to the May 13 letter by stating that the Respondent would supply the requested documents. However, documents were not forthcoming, and the Respondent ignored Madore's followup letter of August 10. Instead, the Respondent went forward with its decision without notifying the Union. Additionally, the Respondent unilaterally implemented its own effect's package. Specifically, the Respondent offered jobs to any employees who wished to commute to New Jersey, but decided not to offer travel or relocation costs to employees who did relocate and not to offer severance to employees who felt that they could not handle the relocation. Thus, by failing to respond to Madore's letters and going forward with its unilateral actions regarding the effects of the move, the Respondent clearly rejected the Union's demands for effects bargaining.

The Respondent argues that it did not respond to the Union's demands for effects bargaining because it believed that the Union sought to negotiate over both the decision and the effects of the relocation and not the effects only,[3] and that the receipt by the Union of information requested by it was a condition precedent to continued negotiations. This argument appears disingenuous in light of the facts in this case. Decisional bargaining, while not required under the circumstances present In this matter, would not have been unlawful, and the Union did not unlawfully bargain to impasse with respect to this nonmandatory subject of bargaining. Since the Respondent notified the Union of the "possibility of relocating" and their willingness to "discuss the problems" before the relocation decision had been made, it was not unreasonable for the Union to conclude that the Respondent was offering to bargain over the decision. In May, 1994 in the absence of any documentation to support the Respondents' claim that its decision to relocate was economically motivated, the Union had no way of knowing that decisional bargaining was not required.[4] It was not until January 27, 1995, well after the move had been completed, that Region 29 dismissed that portion of the Union's charge which pertained to the Respondents' refusal to engage in decisional bargaining, putting the Union on notice, for the first time, that decisional bargaining was not mandatory. Where a Union demands bargaining over both the decision and its effects, and decisional bargaining is not mandatory, this does not excuse an Employer from bargaining over the effects of the decision, *Compact Video*, supra.

Moreover the Union's letters of May 13 and August 10, 1994, both of which explicitly and unambiguously demand decision and effects bargaining. While the Union was certainly interested in decision bagaining that provided no basis for disregarding the clear demand for effects bargaining as well. In both *Otis Elevator*, supra, and *Morco Industries*, supra while finding that the decision to relocate was a nonmandatory sub-

[3] Madore testified that at the May 10, 1994 meeting he advised Pretter and Cooke that the Union would be willing to bargain over the effects of the relocation alone. Pretter denies this. In this instance I credit Pretter's version of this because the notes of the May 10, 1994 meeting taken by Madore and Beverly Ganz indicate that the Union sought to bargain over the decision and the effects of the relocation failing to mention anything about bargaining over the effects alone. Moreover, Madore's letter of May 13, 1994 to Cooke also mentions decision and effects bargaining. Madore failed to explain the omission in his notes of the May 10 meeting and neither Beverly Ganz nor Charles Gibbons were called as witnesses herein. However, it should also be noted that Pretter had no notes of the meeting and Cooke was not called as a witness either.

As to other matters herein, I tend to credit the General Counsels' witness Madore on the basis of my observation of his demeanor as a witness. Moreover, it is hard for me to believe that Pretter took no notes at the May 10, 1994 meeting and if Cooke did, that they were not produced at the hearing. While the General Counsel failed to call Ganz and Gibbons as witnesses to support Madore's testimony, the Respondent, in turn, failed to call Cooke as its witness since it would appear that he acted as a negotiator for the Respondent at the meeting.

From the failure of a party to produce material witnesses or relevant evidence obviously within its control without satisfactory explanation, the trier of the facts may draw an inference that such testimony or evidence would be unfavorable to the party *7-Eleven Food Store*, 257 NLRB 108 (1981); *Publishers Printing Co*., 233 NLRB 1070 (1977); *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15 (1977).

[4] Cf. *Compact Video Services*, supra, at 143–144 (holding that even where decisional bargaining was not required with regard to the sale of a business, the Employer was required to provide information pertaining to the decision so that the Union could determine whether the new owner was a successor employer, and what the rights of its members would be). *Sierra International Trucks Inc.*, 319 NLRB 948 (1995).

ject of bargaining, nonetheless the Board found that the employers had refused to bargain over the effects in violation of the Act. Additionally, the Respondent never made it clear to the Union that it would not bargain over the decision to relocate but might engage in effects bargaining.

The Respondent may also argue that the Union's inaction between May and August reflects a lack of interest in effects bargaining. Again, it bears emphasizing that the Respondent replied to the May 13 letter by promising to supply the requested information. In addition, the Respondent had told Madore that the move was not definite. Both Polack's letter, which speaks of a "possibility" of a move, and the statement at the May 10 meeting that the Respondent was "investigating" a move, indicated that nothing was definite or imminent. In light of the Respondent's promise to supply the information and the uncertainly as to whether the Respondent would actually go forward with the move, it as reasonable for Madore to await further word from the Company before taking further steps to pursue bargaining. When he heard rumors that the move was going forward, he immediately sent a followup letter, reminding the Respondent of the promise to supply information and reiterating the demand for effects bargaining. This time, he received absolutely no response.

Additionally, the Respondent cannot argue that the Union waived its right to engage in effects bargaining. A waiver of statutory rights must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708, (1983); *Olivetti Office U.S.A. v. NLRB*, 926 F.2d 181, 197, (2d Cir. 1991); *Johnson Bateman Co*., 295 NLRB 180 (1989). Under this general standard, a union may be found to have waived its rights if, upon being notified of a proposed change in terms and conditions of employment, it "fails to act diligently in seeking bargaining." *Intermountain Rural Electric Assn.*, 305 NLRB NLRB 783 (1991). The evidence herein shows that the Union acted diligently. On first receiving word of the proposed move, the Union promptly scheduled a meeting with the Respondent to discuss the issues. Madore then verbally demanded bargaining May 10, and reiterated his demand in writing a few days later. Madore's failure to pursue the issue over the next 2 months does not reflect any lack of diligence under the circumstances . The Respondent had told the Union that it was only "investigating" a move. Cooke promised Madore a response to the May 13, 1994 letter. Madore again reacted promptly in August when he heard that the move was going forward. In light of Pretter's testimony that the move was not actually implemented until October 1996, the August 10, 1994 letter above was a timely demand for effects bargaining. Had the Respondent replied to that letter, the parties would have had 2 months in which to possibly conclude effects bargaining. Instead the Respondent ignored the letter.

From all of the above, I find and conclude that the Respondent engaged in unfair labor practices when it failed and refused to bargain collectively with the Union with respect to the effects of its relocation from Brooklyn to New Jersey in violation of Section 8(a)(1) and (5) of the Act.

The complaint also alleges that the Respondent violated Section 9(a)(1) and (5) of the Act by failing and refusing to provide the Union with requested information relative to the wages, hours, and other terms and conditions of employment of the Brooklyn Unit and the New Jersey, Unit. The Respondent denies this allegation.

It is well established that a labor organization which has an obligation under the Act to represent employees in a bargaining unit with respect to wages, hours, and working conditions, including collective bargaining, is entitled, by operation of the statute, on appropriate request, to such information as may be relevant to the proper performance of that duty. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1956). See also *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Failure to fulfill that obligation to furnish relevant material on request is a violation of the employer's duty to bargain in good faith and may violate Section 8(a)(5) of the Act. *Proctor & Gamble Mfg. Co., v. NLRB*, 603 F.2d 1310 (8th Cir. 1979).

An employer's duty to bargain "in a meaningful manner" regarding the effects of a plant relocation also encompasses the obligation to timely provide a Union, on request, with information relevant and necessary to the proper performance of its duties as bargaining representative. *Air Express International Corp.*, 659 F.2d 610 (5th Cir. 1981).[5] The failure to supply a union with such information, even in the absence of any other violation, constitutes a failure to bargain in good faith and a violation of Section 8(a)(5) of the Act. *Sierra International Trucks, Inc.*, supra; [6] *Live Oak Skilled Care & Manor,* 300 NLRB at 1042, 1047.[7]

Where the requested information concerns items and conditions of employment relating to employees in the bargaining unit represented by the Union, the information is presumptively relevant to the Union's representative function. *George Koch & Sons, Inc.*, 295 NLRB 695 (1989). See *San Diego Newspaper Guild v. NLRB,* 548 F.2d 863 (9th Cir. 1977). The Board uses a liberal, discovery-type standard to determine whether the information is relevant, or potentially relevant, to require its production. *NLRB v. Acme Industrial Co*., supra; *W-L Molding Co.*, 272 NLRB 1239 (1984). In evaluating the relevance of broad categories of requested information, the Board stated in *Ohio Power Co*., 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976):

> Where the information sought covers the terms and conditions of employment within the bargaining unit thus involving the core of the employer-employee relationship, the standard of relevance is very broad, and no specific showing is normally required.

It is only necessary to find that the desired information is probably relevant, and appears reasonably calculated to lead to the discovery of relevant evidence that would be of use to a union in carrying out its statutory duties and responsibilities. *New England Newspapers*, 856 F.2d 409, 413, (1st Cir. 1988); *W-L Molding Co*., supra; *IMTT-Bayonne,* 304 NLRB 476 (1991). Information pertaining to the identity of bargaining unit employees, and their wages and other terms and conditions

[5] In the context of bargaining over the effects of a merger and relocation, Air Express required the Employer to provide the union with the acquisition agreement and employees' names, job classification, and dates of hire

[6] In the context of bargaining over the sale of a business, *Sierra* required the Employer to supply the union with the assets sale agreement.

[7] Also in the context of the sale of a business; *Live Oak* required that the Employer supply the union with sale agreements, timecards, an employee list with addresses and dates of hire, job classifications workers' compensation information, and payroll records to ensure that wages and benefits were properly paid.

of employment, is presumptively relevant. *Sea-Jet Trucking Corp.,* 304 NLRB 67 (1991); *Excel Fire Protection Co.,* 308 NLRB 241 (1992); *Dynatron/Bondo Corp*., 305 NLRB 574 (1991); *IMTT-Bayonne*, supra; *New England Newspapers*; supra; *Richmond Convalescent Hospital*, supra.

If a union's information request is overbroad, an employer must nevertheless provide all requested information which is relevant and necessary to the proper performance of the union's statutory bargaining duties. *Azabu U.S.A.,* 298 NLRB 702 (1990). In the instant case, for example, the Respondents should have provided the Union with information relevant to effects bargaining, even if information relevant to decisional bargaining did not have to be provided. Requested information which is not in the employer's possession must be provided. Requested information which is not in the employer's possession must be provided if it can be obtained from a third party with whom the employer has some relationship. *Public Service Co. of Colorado*, 301 NLRB 238 (1991). In the present case, for example, any requested insurance coverage information obtainable from the union or unions representing other bargaining units should have been provided by the Respondents to the Union. Information requested by a union must be provided reasonably promptly. *Fitzgerald Mills*, 133 NLRB 877, enfd. 52 LRRM 2174 (2d Cir. 1963). For example, the payroll records provided in February, 1995 (G.C. Exh. 7) did not satisfy the Respondents' bargaining obligation. A Union may refuse to engage in effects bargaining unless and until necessary information is provided. *Compact Video Services*, 319 NLRB at 138. Here, the union was reasonable in its reluctance to request further bargaining sessions in the absence of the information it needed to properly represent the warehouse unit.

In the instant case, all of the requested information set forth in paragraphs 17 and 18 of the complaint pertains to the identity of bargaining unit employees and their wages and other terms and conditions of employment. Therefore, it is presumptively relevant. Without the requested information pertaining to employee wages, benefits, and other terms and conditions of employment, it was impossible for the Union to properly perform its statutory duties. The requested information was necessary to ensure that employees were receiving the wages and benefits to which they were entitled, to negotiate a severance package for employees who chose not to transfer to New Jersey, and to negotiate transportation costs and other benefits for employees who did transfer to New Jersey. In the absence of the requested information pertaining to the location of the New Jersey plant and the identities of the employees represented by the UAW it is inconceivable how any union could have effectively represented these employees.

The Respondent contends that much of the information had been supplied previously in contract bargaining. With respect to the former point, the Respondent's representatives were aware that Madore had not previously been involved directly in dealings with the Company. If the Respondent genuinely felt that Madore's requests were burdensome or repetitive, it could have pointed out to him in writing, in a systematic fashion, which information ws already accessible to him. Instead, the Respondent promised to collect the requested documents, then cut off all further communications with the Union. The duty to supply information is an aspect of the duty to bargain in good faith, and the Respondent is obligated to reply to an information request in a fashion which is consistent with the principles of good faith. See *Rochester Acoustical Corp*., 298 NLRB 558, 562 (1989). Promising to supply information, then leaving Madore to guess which information the Company had decided not to supply on the ground that the Union already was in possession thereof, is inimicable to good-faith bargaining. Moreover, the Respondent failed to produce evidence to establish.that it had previously supplied any significant portion of the information at issue in this case.

The Respondent also introduced correspondence from Cooke to Region 29 during the investigation of this case. Cooke sent copies of that correspondence to Madore, and some of the Union's information requests were answered in those letters. However, that correspondence began in November, after the Respondent had initiated the move, It was of little use to the Union at that point in time. An employer is obligated to respond to an information request in a timely fashion. *Bundy Corp.* 292 NLRB 671, 672 (1989). Supplying information after the move has commenced, and 6 months after it was requested, is not a timely response. Thus, the Respondent's refusal to supply information is a second basis for a finding that the Respondent failed to bargain over the effects of its decision to move.

Accordingly, by refusing to timely provide the requested information pertaining to effects bargaining, and by failing to timely notify the union of their decision to relocate, the Respondent failed and refused to bargain in good faith with the Union, in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

Accordingly, by refusing to timely provide the requested information pertaining to effects bargaining, and by failing to timely notify the union of their decision to relocate, the Respondent failed and refused to bargain in good faith with the Union, in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has failed and refused to meet and bargain with the Union in violation of Section 8(a)(1) and (5) of the Act with regard to its employees in the appropriate unit, the Respondent shall be ordered to cease and desist therefrom and on request, to bargain collectively in good faith with the Union as the exclusive bargaining representative of all its employees in the appropriate unit, and in the event an understanding is reached, to embody such understanding in a signed agreement. See *Winn-Dixie Stores*, 243 NLRB 972 (1979). In addition, the Respondent shall maintain in effect the terms and conditions of employment specified in the now expired collective-bargaining agreement regarding the above appropriate bargaining unit unless and until the Respondent and the Union

agree otherwise, or until the parties bargain to a legitimate impasse.

Furthermore, as a result of the Respondent's unlawful failure to bargain in good faith with the Union about the effects of its decision to relocate, the unit employees have been denied an opportunity to bargain through their collective-bagaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, it is necessary, in order to effectuate the purposes of the Act, to require the Respondent to bargain with the Union concerning the effects of the relocation of its facility on its employees, and to accompany the order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to re-create in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. The Respondent should therefore be required to pay backpay to employees in a manner similar to that required in *Transmarine Navigation Corp*., supra.

Transmarine involved an employer who had moved its operations from Los Angeles to Long Beach, California, and terminated its Los Angeles employees. The union representing the Los Angeles employees was only given 3 days' notice of this change, and the employer did not offer to bargain over the effects of its relocation until 7 months after terminating its Los Angeles operations. Although the relocation and merger were economically motivated and decisional bagaining was not mandatory, the Ninth Circuit found that the Employer had violated Section 8(a)(5) of the Act by withholding information about the shutdown, deterring the union from bargaining over its effects on the employees. *Transmarine Navigation*, 380 F.2d 933 (9th Cir. 1967). In a subsequent Supplemental Decision and Order, the Board noted that the employees had been "denied an opportunity to bargain through their contractual representative at a time prior to the shutdown when such bargaining would have been meaningful . . . [rather than] when the collective strength of the employees' bargaining unit had been dissapated." *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). Since it was "impossible to reestablish a situation equivalent to that which would have prevailed had the Respondent more timely fulfilled its statutory bargaining obligation," the Board fashioned a partial backpay remedy, designed "both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties" bargaining position is not entirely devoid of economic consequences for the Respondent." *Transmarine*, 170 NLRB at 390. Accordingly, the Board awarded backpay to the Los Angeles employees, to run from a date 5 days from the issuance of the Supplemental Decision "until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains for agreement with the Union on those subjects pertaining to the effects of the closing on guards at its Los Angeles terminal; (2) a bona fide impasse in bargaining, (3) the failure of the Union to request bargaining within 5 days of this Supplemental Decision, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union, or (4) the subsequent failure of the Union to bargain in good faith." *Transmarine,* 170 NLRB at 390. The minimum backpay award per employee awarded by the Board was 2 weeks' backpay; the maximum award was the amount the employees would have earned from the date of the shutdown of the Los Angeles facility until the date the employees secured equivalent employment elsewhere. *Transmarine,* 170 NLRB at 390. The minimum backpay award per employee awarded by the Board was two weeks' backpay; the maximum award was the amount the employees would have earned from the date of the shutdown of the Los Angeles facility until the date the employees secured equivalent employment elsewhere. *Transmarine*, 190 NLRB at 390. Also see, *Metropolitan Teletronics Corp*., 279 NLRB 457 (1996); *Live Oak Skilled Care & Manor*, supra; *Richmond Convalescent Hospital*, supra; *Sierra International Trucks, Inc.*.

The same considerations which led the Board to award a *Transmarine* remedy in the cases cited above are present in the instant case. Although the Respondents notified the Union that a relocation was possible, they failed to provide the Union with any notice that the decision to move had been finalized. Additionally, the failure to provide the Union with the requested information made meaningful bargaining impossible. For example, without knowing when the Respondent was actually relocating, or where, or the identities of the current bargaining unit members, the Union was unable to bargain "at a meaningful time, in a meaningful manner." As with the cases cited above, the change is now a fait accompli, necessitating a remedy which will, in some fashion, restore a measure of bargaining strength to the Union. The only means of restoring some measure of bargaining power to the Union is through the award of a *Transmarine* remedy.

Additionally, the *Transmarine* remedy is necessary to mitigate the losses suffered by employees as a result of the move, and the Respondents' failure to bargain in good faith about its effects. For example, the move from Brooklyn to Bloomfield, New Jersey, confronted employees with the choice of either expending time and money on the extra commute, or giving up their jobs. Since the move to New Jersey involved a monetary savings on the part of the Respondent the Union might have succeeded in negotiating for commuting or relocation expenses, had the Respondent bargained in good faith. It is unclear, based on the state of the record, how many of the employees in the Brooklyn unit left the Respondents' employ because of the difficulty and expense of commuting to New Jersey. However, it is clear that if the Union had had an opportunity to bargain over transportation and relocation expenses, the Union might have been able to mitigate the hardship to employees occasioned by the move, and the concomitant loss of its membership. It is also unclear whether employees who gave up their jobs received any accrued benefits to which they were entitled, or whether the Union could have negotiated a severance package had the Respondent bargained in good faith. Although New Jersey had a higher minimum wage than New York in 1994, it is possible that employees earning more than the minumum wage, received a pay cut after the move to New Jersey, or suffered a loss in other benefits. Had the Respondent bargained in good faith, the Union might have negotiated higher wages or better benefits for unit employees.

The *Transmarine* remedy is not onerous. Since the backpay awarded in a *Transmarine*-type remedy does not begin to accrue until 5 days after any Board decision, a Respondent may cut off its liability immediately by either reaching agreement, or bargaining to impasse with respect to the effects of its decision. More importantly, the *Transmarine* remedy is warranted by the facts of this case.

The Respondent may argue, however, that a *Transmarine* remedy is not appropriate because it offered jobs in the new facility to all of the unit employees. That argument should be rejected for several reasons. First, the Respondent's offer of work to the unit employees was part and parcel of the unfair labor practice the Respondent committed. Instead of dealing with the Union about the terms and conditions of employment for employees at the new facility, the Respondent decided to contact them directly and offer them work in New Jersey. The Respondent should not be allowed to rely on its own misdeeds in order to avoid a remedy.

Second, as indicated above, the Respondent's argument is premised upon the erroneous assumption that the purpose of the *Transmarine* remedy is to compensate employees for lost earnings. However, as the Board made clear in *Transmarine*, the purpose of the remedy is not only to compensate the employees, but to restore to the Union the bargaining leverage it would have enjoyed in the absence of the employer's unfair labor practices. 170 NLRB at 390. Thus, as the Board stated in *Transmarine*, the remedy is designed to ensure that the bargaining has economic consequences for the employer. Therefore, the need for a *Transmarine* remedy is not vitiated by the Respondent's offer of jobs to the unit employees at the new facility.

The Respondent may also argue that the *Transmarine* remedy is not necessary because it gave the employees everything that the Union would have asked for: jobs at the new facility, etc. This argument fails for several reason. First, as noted above, it would allow Respondent to profit from its own wrongdoing. Second, it is contrary to fact. Pretter acknowledged that the Union asked for transportation costs for the employees forced to travel longer distances because of the move. Madore testified that, if the Respondent had allowed effects bargaining to take place, the Union would have sought relocation reimbursement for employees who chose to move to be closer to their relocated jobs, and severance for those employees unable or unwilling to accept jobs because of the new location. Therefore, there was much for the parties to negotiate about.

Moreover, because this case does involve employees who incurred increased transportation costs and/or moving expenses, and because the Respondent failed to bargain over those costs, the *Transmarine* remedy should be modified to calculate employees' losses by taking into consideration these added costs. Thus, to determine whether an employee who accepted a job at the New Jersey facility, in fact incurred losses under the *Transmarine* formula, income from employment at the New Jersey facility should be offset by added commuting costs. If the employees' earnings, after subtracting commuting costs, were less than their earnings before the relocation, the new job would not be "equivalent employment," and they would be entitled to more than 2 weeks' backpay.

However, any backpay due shall be based upon earnings which the unit employees would normally receive during the applicable period, less any set interim earnings, and shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Also, the Respondent argues that in awarding the *Transmarine* remedy in *Live Oak Skilled Care & Manor*, supra, the Board stated that it was not deciding "whether the remedy providing for a minimum of 2 weeks' backpay in *Transmarine* is warranted for all effects bargaining violations, regardless of loss." 300 NLRB at 1040. However, the Board has consistently followed *Live Oak Skilled Care & Manor* in subsequent cases involving the sale by an employer, where the successor retained the bargaining unit employees. *Sierra International Trucks*, supra; *Compact Video Services*, supra; *Richmond Convalescent Hospital*, supra. The instant case is arguably distinguishable on the ground that it involves a relocation rather than a sale of a business. That is not a distinction which argues for a different result. The need to restore to the Union its lost bargaining power is the same in a case of a relocation as in a case of a sale. Moreover, there is palpable harm to the employees which can be remedied in a relocation case, but which is not present in the case of a sale. Some employees find the job at the new location to be too far to travel and thus incur loss of earnings. Other employees are confronted with a longer and more expensive commute. Thus, there are real losses to be compensated in a case like this. Accordingly, the holding of *Live Oak* should be applied in this case, and the *Transmarine* remedy should be imposed.

Moreover, The Respondent in its brief also asserts that the Union is "hard pressed to show that there has been an erosion of their bargaining position for the implementation of a *Transmarine* remedy. The Respondent bases this on its alleged timely notice of the relocation to the Union, on-going negotiations with the Union, its offers of jobs to unit employees at the new facility, etc., and attempts to distinguish a series of cases in which a *Transmarine* remedy was imposed on the basis of untimely notice. The Respondent adds that additionally it is "undisputed that there was no intent on Respondent to mislead or withhold information concerning its decision to transfer the facility by virtue of the April 6, 1994 notification letter (G.C. Exh. 3)." The Respondent continues that any deterrence to the parties bargaining over the effects of the relocation was based upon the Union's own actions by conditioning their request to bargain over effects and decision and on the providing of information prior to the scheduling of future negotiations. The record in this case does not support the contentions of the Respondent as more particularly discussed before.

The Respondent also cites the decision in *NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030 (10th Cir. 1996), to support its contentions herein. The court in that case stated that the adequacy of notice depends on the facts of a given case. The court found that the union had advance notice of the subcontracting decision, the union had ample opportunity to request bargaining both during the week that the electricians were still on the payroll and thereafter, and there was evidence of willingness on the part of the company to bargain about effects. However, in the instant case the Respondent did not give the Union clear notice of when the relocation from Brookyn to New Jersey would actually take place, the Union did request to bargain about the effects and decision to relocate in a timely fashion, the Respondent failed to furnish requested information to The Union, and the Respondent in effect refused to bargain with the Union over the effects of the relocation.

Additionally, the record in this case shows that the Respondent has a history of and a proclivity to commit unfair labor practices in violation of the Act. In the light thereof, I shall recommend the issuance of a broad-cease-and-desist order prohibiting the Respondent from violating the Act "in any other manner." *S. E. Nichols*, 284 NLRB 556 (1987), enfd. 862 F.2d 952 (2d Cir. 1988), cert. denied, 490 U.S. 1108 (1989); *St.*

Frances Hospital, 252 NLRB 1247 fn.3 (1980); *Hickmott Foods*, 242 NLRB 1357 (1979).

The Respondent shall also be required to post the customary notice. Moreover, for the same reason as above, the Respondent shall be ordered to mail the notice to any employees who did not accept the offer of transfer to the new locations or who are otherwise no longer employed by the Respondent since August 31, 1994.

The Respondent in its brief also argues that under *Fairmont Hotel*, 314 NLRB 534 (1994) the Administrative Law Judge may rule on the adequacy of a proffered settlement pursuant to the Respondent's motion to dismiss, "where the proffered settlement advances the purposes of the Act and resolves the alleged unfair labor practices. See *Fairmont Hotel* 314 NLRB No. 93 (1994)."

During the hearing the Respondent moved to dismiss the complaint herein and/or for the administrative law judge to approve a proposed settlement. The General Counsel and the Union opposed such settlement. The Respondents' proposed settlement was as follows:

> 1. Payment of two (2) weeks of the partial/modified Transmarine remedy to employees who did not make the move from Brooklyn to Bloomfield;
>
> 2.No *Transmarine* remedy for any employee that does appear on the New Jersey payroll of Respondent;
>
> 3.That Respondent would provide documentation to the extent that it hasn't been provided and to the extent that it exists, as per the the Union's request for documentation embodied in their May 13, 1994 correspondence (or in the alternative, makes said books and records available to Charging Party for their inspection);
>
> 4.That the Employer would agree to continue to bargain over the "effects" of the relocation; and
>
> 5.That there would be a Formal Board settlement, with an appropriate notice posting.

In *Fairmont Hotel* supra, the Board held that where the withdrawal of a complaint is a matter for :adjustication" before the administrative law judge (after the hearing opens), the Board has the authority to determine whether withdrawal of the complaint is appropriate.

The General Counsel's authority not to prosecute includes settlement of a case over a parties objection where a complaint has issued but the hearing has not opened. See also Section 102.18 of the Board's Rules and Regulations and Sec 101.9 of Statements of Procedure. On the other hand, if the General Counsel rejects a proffered settlement and wishes to continue to prosecute the case, the Board will be called on to exercise its adjudicatory function. In that connection, the Board may rule on the adequacy of the proffered settlement, pursuant to a Respondent motion to dismiss. *Fairmont Hotel*, supra at 534 fn.4.

Also see *Independent Stave Co*., 287 NLRB 740 (1987).

In *Independent Stave Co.,* supra, the Board set forth some of the critical factors to be considered as to whether approval of a proposed settlement would effectuate the purposes and policies of the Act. Among those cited for our purposes herein were:

1. Whether the parties have agreed to be bound regarding the settlement;

2. Whether the settlement is reasonable in the light of the nature of the violations alleged, the risks inherent in litigation and the stage of the litigation;

3. Whether the Respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practices disputes.

Moreover, in *Cooper State Rubber,* 301 NLRB 138 (1991), the Board rejected a unilateral settlement on the following grounds;

1. That the opposition of the General Counsel and the Charging Party to the settlement was a significant factor to be considered in determining whether to accept the proffered adjustment;

2. The adjustment did not address all the allegations of the complaint; and

3. The proposal did not protect against future misconduct by the Respondent.

Applying the rationale of the above cases to the instant matter, I find the proposed settlement offer of the Respondent falls short of the criteria necessary for acceptance. One of the important considerations in coming to this decision is the fact that both the General Counsel and the Union oppose the proposed agreement. Although it is clear that the opposition from these parties is not a decisive factor to be weighed, it is definitely significant and militates heavily against accepting the unilateral proposal. *Iron Workers Local 27 (Morrison-Knudson),* 313 NLRB 215 (1990); *Food Lion, Inc*., 304 NLRB 602 fn. 4 (1991); *Cooper State Rubber*, supra. Moreover, the remedy proposed by the Respondent regarding the amounts to be paid to the unit employees involved regarding backpay and interest and whatever additional benefits owed to these employees may be inadequate under the facts of this case. Additionally, the Respondent has a long history of serious unfair labor practices and in addition, were the proposed settlement offer to be accepted, it would not conserve the Board's resources because a hearing on the merits of the allegations in thecomplaint has already been held in this proceeding. *Iron Workers Local 27 (Morrison-Krudson*) supra; *Independent Stave Co.*, supra.

CONCLUSIONS OF LAW

1.Sea-Jet Trucking Corporation, A.P.A. Warehouse, Inc., affiliated Terminals, Inc., Sea-Jet Industries, Inc., & Sea-Jet Trucking & A.P.A. Warehouses, Inc., a Single Employer and each of them are and have been at all times material herein employers engaged in commerce within the meaning of Section 2(2),(6) and (7) of the Act.

2.International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. (a) At all times material herein until in or around December 1994, the following employees of the Respondents, herein called the Brooklyn Unit, constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time warehouse employees employed by Sea-Jet Trucking Corporation, A.P.A. Warehouse, Inc., Affiliated Terminals, Incorporated, Sea-Jet Industries, Incorporated, and Sea-Jet Trucking & A.P.A. Warehouse, Inc., at its 140-43rd Street, Brooklyn, New York location, excluding all office clerical employees, trailer drivers, truckdrivers, drivers' helpers, building maintenance employees, truck maintenance, professional employees and supervisors as defined in the Act.

(b) At all times material since in or around 1994, the following employees of the Respondents, herein called the New Jersey Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time warehouse employees employed by Sea-Jet Trucking Corporation, A.P.A. Warehouse, Inc., Affiliated Terminals, Incorporated, Sea-Jet Industries, Incorporated, and Sea-Jet Trucking & A.P.A. Warehouse, Inc., at its 8 Franklin Street, Bloomfield, New Jersey, location, excluding all office clerical employees, trailer drivers, truckdrivers, drivers' helpers, building maintenance employees, truck maintenance, professional employees and supervisors as defined in the Act.

4. (a) On December 19, 1989, the Board issued a "Decision, Order and Certification of Representative" in Cases 29–RCA–6841 and 29–RC–6844, certifying the Union as the exclusive collective-bargaining representative of the employees in the Brooklyn Unit.

(b) On August 14, 1991, the Board issued a Decision and Order, reported at 304 NLRB 67, ordering the Respondents, inter alia, to recognize and bargain with the Union pursuant to the certification issued in Cases 29–RC–6841 and 29–RC–6844 on December 19, 1989, described above in subparagraph (a).

(c) On July 15, 1992, the United States Court of Appeals for the Second Circuit entered a judgment enforcing the Board's Decision and Order, reported at 304 NLRB 67, described above in subparagraph (b).

5. At all times material since December 19, 1989, until in or around December, 1994 the Union has been , and is now, the exclusive bargaining representative of all the employees of the Brooklyn Unit within the meaning of Section 9(a) of the Act.

6. On a date presently unknown in the summer or fall of 1994, the Respondents commenced the relocation of its principal facility from 140 43rd Street, Brooklyn, New York to 8 Franklin Street, Bloomfield, New Jersey, which relocation was completed in or about January 1995.

7. At all times material since a date presently unknown in the summer or fall, 1994, the Union has been the exclusive collective-bargaining representative of the New Jersey Unit.

8. On or about May 10 and 13, and August 10, 1994, the Union requested that the Respondent's bargain collectively with the Union with respect to the effects of the relocation from Brooklyn, New York to Bloomfield, New Jersey.

9. The above relates to the wages, hours, and other terms and conditions of employment of the Brooklyn Unit and the New Jersey Unit and is a mandatory subject for the purpose of collective bargaining.

10. Since about May 10, 1994, the Respondent's have failed and refused to bargain collectively with the representatives of these employees about the effects of the relocation of its facility noted above, and have thereby engaged in, and are engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

11. On or about May 10 and 13, 1994, the Union orally and by letter, respectively, requested that the Respondents furnish the Union with the following information:

> Location and mailing address of the New Jersey facility.
>
> The following information pertaining to Respondents' Annuity Plan covering employees in the Brooklyn Unit:

1. (a) A full and detailed history of each such employee, including date of hire, date payments started, credited service, rate of new payments to annuity, breaks in annuity service or payments or credits, vesting or non-vesting (including the effect of the new five-year provision and its effective date), date of expected employee vesting and eligibility to receive upon eligibility, whether or not any of the employees involved are eligible for yearly disability annuity, survivors rights, if any, and whether such annuity payments by the employer are current or deficient, and in what amount.

(b) Whether or not the present annuity plan allows the employer, if agreed to in bargaining, to make annuity payments for employees during such time they are laid off, for both vested and non-vested employees, and whether there is a difference in making annuity payments to a non-active and/or laid off employee, if the employee is on temporary layoff with recall rights, and which provisions of the Annuity Plan apply to this question.

(c) Annual Report Form 5500 and Schedule B for Plan Years (specify years).

(d) Complete Actuarial Valuation (specify years).

(e) Trustee's Assets Statement (specify years).

(f) Trust of Insurance Agreement relating to holding and investment of assets of the Annuity Plan.

(g) Current census of the unit (i.e., date of birth, sex, annuity service for active workers; same information for retirees with annuity amount and type of benefit specified).

(h) List of other units, if applicable, covered under current Annuity Plan (including number of participants in each unit and summary of any material differences in plan documents covering the several units).

(i) Any redrafts or amendments to the Annuity Plan document since its inception.

3. Holidays to be paid to employees prior to anyone being laid off.

4. Whether any Brooklyn Unit employees have unpaid bereavement leave claims, and their names, clock numbers, and the amount of days due to each employee.

5. Whether any Brooklyn Unit employees are out on Jury Duty and their names, clock numbers and any money owed to these employees.

6. The present vacation schedule and the names, clock numbers, seniority dates, departments of all employees who are eligible for any vacation.

7. Names and clock numbers and type of leave, for all Brooklyn Unit employees presently on leaves of absence.

8. A list of Brooklyn Unit employees on layoff by name, seniority, clock number, job description and department, and the amount of benefits owed or being received by the laid-off employees.

9. A list of the bargaining unit employees presently on Workers Compensation by name, clock number, and seniority with the amount of benefits owed or being received by these employees.

10. A list of bargaining unit employees by name and clock number who have unpaid hospital insurance claims, including the amounts that they are owed.

11. A copy of Respondents' insurance plan in whatever form and a copy of its benefits schedule procedure and premiums paid, single/married and families.

12. A list of bargaining unit employees by name and clock number who have unpaid life insurance claims, including the amount they are owed.

13. A list of all bargaining unit employees by name and clock number with the average hours they have worked since January 1990, and the current rate of pay for each employee.

14. A list of all bargaining unit employees by name and clock number with the estimated list earnings for the year 1990 due to the reduction of employees.

15. A list of any part-time workers presently working in the plant by name and clock number and the jobs they are presently working, and hourly wages being paid.

16. A copy of all job classifications.

17. A copy of any oral or written side agreements made between the Company and any bargaining unit employees and/or any employee committee since January 1990.

18. A copy of all the overtime records of hours of equalization of bargaining unit members since January 1990.

19. A copy of names and the rate of the job and the date any employee exercised his/her bumping rights since January 1990.

20. A list of names of any bargaining unit employees temporarily transferred, for what length of time transferred, and the rates of pay paid since that time.

12. On or about August 10, 1994, the Union requested that the Respondents furnish the Union with the following information:

1. Names of members of the Brooklyn Unit who were transferred to the new location, their salaries, benefits, any incentives, and any compensation for transportation.

2. Type of work being performed at the new location, number of employees at the Brooklyn facility and the new location, and their hours and benefits.

13. The information described above requested by the Union, relates to wages, hours, and other terms and conditions of employment of the employees in the units described above, and is necessary for and relevant to, the Union's performance of its functions as the exclusive collective bargaining representative of the employees in the above units.

14. Since on or about May 10, 1994, the Respondent has failed and refused to furnish the Union with the information requested as described above, and has thereby refused to bargain collectively, and are refusing to bargain collectively, with the representative of their employees and has thereby engaged in, and are engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

On the basis of the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[8]

ORDER

The Respondents, Sea-Jet Trucking Corporation, A.P.A.Warehouse, Inc., Affiliated Terminals, Incorporated, Sea-Jet Industries, Incorporated, and Sea-Jet Trucking & A.P.A. Warehouses, Inc., A single Employer, Bloomfield, New Jersey, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Failing to bargain in good faith with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO concerning the effects on employees of its decision to relocate its Brooklyn, New York facility to Bloomfield, New Jersey.

(b) Failing or refusing, on request, to furnish the Union with information relevant and necessary to the Union's fulfillment of its functions as the exclusive collective-bargaining representative of the employees in the appropriate units.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively in good faith with the Union concerning the effects on its employees in the appropriate units of the decision to relocate its Brookyn, New York facility to Bloomfield, New Jersey, and if an understanding is reached embody the understanding in a signed agreement.

(b) Pay to the unit employees involved in the relocation in any way, limited backpay in the manner set forth in the remedy section of this decision.

(c) On the Union's request promptly furnish the Union with the information sought in its May 10, May 13 and August 10, 1994 letters.

(d) Preserve, and within 14 days of a request make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in New York, New York and Bloomfield, New Jersey copies of the attached notice marked "Appendix[9] Copies of the notice, on forms provided by the Regional Director for Region 29 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 31, 1994. Moreover, the Respondent shall also be ordered to mail the notice to any employees who did not accept the offer of transfer to the new loca-

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tion or who are otherwise no longer employed by the Respondent as of May 10, 1994.

(f) Within 14 days after the service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to bargain collectively and in good faith with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO, concerning the effects resulting from the relocation of our facility from Brooklyn, New York to Bloomfield, New Jersey on its employees in the appropriate units.

WE WILL NOT fail or refuse to furnish the Union with the information requested by it in its letters of May 10, May 13 and August 10, 1994, so that the Union may discharge its duties as the employees' collective-bargaining representative.

WE WILL NOT in any manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning the effects on their employees in the appropriate units resulting from the relocation of the Respondents' facility from Brooklyn, New York to Bloomfield, New Jersey.

WE WILL, furnish the Union with the information requested by it in its May 10, May 13 and August 13, 1994 letters, so that the Union may discharge its duties as the employees' collective-bargaining representative.

WE WILL, pay employees involved in the relocation in any manner limited backpay with interest as provided in the remedy section of this decision.

SEA-JET TRUCKING CORPORATION, A.P.A. WAREHOUSES, INC., AFFILIATED TERMINALS, INCORPORATED, SEA-JET INDUSTRIES, INCORPORATED, AND SEA-JET TRUCKING & A.P.A. WAREHOUSES, INC., A SINGLE EMPLOYER